Supreme Court, U. S.
FILED
SEP 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

DOCKET NO. 75-291

HERBERT C. KLEIN,

Petitioner,

vs.

KENNETH ROBINSON, an infant by his parent and Guardian ad Litem, ERNESTINE ROBINSON and ERNESTINE ROBINSON, individually; PAUL JORDAN, LAWRENCE KRAMER, and WILLIAM S. HART, individually and as Mayors respectively of Jersey City, Paterson, Plainfield and East Orange; THE CITIES OF JERSEY CITY, PATERSON, PLAINFIELD and EAST ORANGE; THE BOARDS OF EDUCATION OF THE SCHOOL DISTRICTS OF JERSEY CITY, PATERSON, PLAINFIELD and EAST ORANGE; THE BOARD OF SCHOOL ESTIMATE OF JERSEY CITY; and RICHARD F. McCARTHY; all individually and as representatives of a class or classes,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HAROLD J. RUVOLDT, JR.,
Attorney for Respondents,

168 Ocean Avenue,
Jersey City, New Jersey 07305

N. J. Appellate Printing Co., Inc., Woodbridge, N. J. (201) 636-2030

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	3
Questions Presented	4
Counter-Statement of Case	5
Federal Question	7
Argument	8
Point I:	8
Point II:	13
Conclusion	19

CASES CITED:

Abelson's Inc. v. N.J. State Board of Optometrists, 5 N.J. 412 (1950) 18

Adoption of Seal, 112 N.J. Super. 325 (1970) 12

Alder v. Board of Education, 342 U.S. 485 7

Asbury Park Press v. Woolley, 33 N.J. 1 (1966) 15

Ashwande v. Tennessee Valley Authority, 297 U.S. 288 (1936) 15

Bd. of Education of Elizabeth v. City Coun. of Elizabeth, 55 N.J. 501 (1970) 14

Boulevard Apartments v. Mayor and Council of Lodi, 110 N.J. Super. 406 (1970) 12

Booker v. Board of Education, 45 N.J. 161 (1965) 12

Brown v. Board of Education, 347 U.S. 483 (1954) 10, 16

TABLE OF CONTENTS

Page

CASES CITED:

Burris v. Wilkerson,
310 F. Supp. 572 (W.D. Va. 1969),
397 U.S. 44 (1969) 18

C. F. Baker v. Carr,
369 U.S. 186 (1962) 15

Department of Banking v. Pink,
317 U.S. 264 3

Griffith v. County School Board of
Prince Edward County,
377 U.S. 218 (1964) 16

Hart v. Teaneck,
135 N.J.L. 174 (1947) 12

Hobson v. Hansen,
296 F. Supp. 401 (D.D.C. 1967) 17

Jenkins v. Morristown,
58 N.J. 483 12

Jones v. Haridor Realty Corp.,
37 N.J. 384 (1962) 12

Landis v. School District No. 44,
57 N.J.L. 509 (Sup. Ct. 1895) 10

Marbury v. Madison, 1 Cranch,
137, 2 L.Ed. 60 (1803) 15

Massachusetts v. Mellon,
262 U.S. 288 (1923) 15

McInnis v. Ogilvie,
293 F. Supp. 327 (N.D. Ill. 1968) aff'd per
curiam sub nom McInnis v. Ogilvie, 394 U.S.
322 (1969) 17, 18

Morean v. Board of Education of Montclair,
42 N.J. 237 (1964) 12

TABLE OF CONTENTS

Page

CASES CITED:

Muakrat v. United States,
219 U.S. 356 (1911) 15

Public Service Coordinated Transport v. Newark
Elizabeth Independent Bus Owners Assoc.,
3 N.J. 118 (1949) 16

Puchalski v. New Jersey State Parole Board,
104 N.J. Super. 294, aff'd 55 N.J. 113 (1969)
cert. den. 398 U.S. 938 (1970) 13

Reynolds v. Sims,
377 U.S. 533 (1964) 15, 16

Riccio v. Hoboken,
96 N.J.L. 104 (Supp. Ct. 1903), 69 N.J.L.
649 (Err. & App. 1903) 10

Robinson v. Cahill,
118 N.J. Super. 223 (Law Div. 1972); 119 N.J.
Super. 40 (Law Div. 1972); aff'd – N.J. – (1973) .. 6

San Antonio Independent School District v. Rodriguez,
– U.S. –, 93 S. Ct. 1278, 38 L.Ed. 16 (1973) 18

Smith v. Board of Examiners of Feeble Minded,
N.J. 35:46 (1913), Art. 1, Sec. 1 11

State v. Parkhurst,
9 N.J.L. 427 (Sup. Ct. 1802) 15

Thomas v. Iowa,
209 U.S. 258 7

Trustees of Rutgers College v. Richman,
41 N.J. Super. 259 (Ch. Div. 1956) 15

TABLE OF CONTENTS

Page

CASES CITED:

U.S. v. Jefferson County Bd. of Education, 372 F.2d 836 (5th Cir. 1966) cert. den., 389 U.S. 840 rehearing den., 389 U.S. 965 16

Washington National Insurance Company v. Board of Review of New Jersey Unemployment Compensation Commission, 1 N.J. 545 (1949) 11, 12

West Morris Regional Board of Education v. Sills, 110 N.J. Super. 234, 58 N.J. 464 (1971) 12

West Morris Reg. Bd. of Ed. v. Sills, 58 N.J. n. (1971) 15

Whitney v. California, 274 U.S. 337 7

Wilentz v. Hendrickson, 135 N.J. Eq. 244 (Err. & App. 1944) 15

William v. Rhodes, 393 U.S. 23 (1968) 17

Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 15

U.S. CONSTITUTION CITED:

Art. IV. Sec. 4 ..... 4, 7

N.J. CONSTITUTION CITED:

Art. VIII, Sec. IV, par. 1 ..... 7, 8

FEDERAL STATUTE CITED:

28 U.S.C.A. §1257(3) 3

TABLE OF CONTENTS

Page

RULES CITED:

New Jersey Court Rules 2:11-3(b) 3

New Jersey Court Rules 2:11-6(a) 3

AUTHORITIES CITED:

Roscoe L. West, Elementary Education in New Jersey: A History, D. Van Nostrand Co., Inc. (Princeton 1964) pp. 42-45 8

8 Rutgers L. Rev. 501 13

12 Rutgers L. Rev. 449 14

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

DOCKET NO.

WILLIAM K. DICKEY, ALFRED N. BEADLESTON
and THOMAS H. KEAN,

Petitioners,

vs.

KENNETH ROBINSON and
WILLIAM T. CAHILL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

The Respondents Kenneth Robinson et al. as the plaintiffs in the cause which the Petition seeks to review, file the instant brief in opposition to the petition for a writ of certiorari to review the judgment of the New Jersey Supreme Court.

OPINIONS BELOW

The opinion of the New Jersey Superior Court is reported at 118 N.J. Super. 223, 287 A.2d 187: supplemental opinion of the New Jersey Superior Court is reported at 119 N.J. Super. 40, 289 A.2d 569; the opinion of the New Jersey Supreme Court is reported at 62 N.J. 473, 303 A.2d 273; supplemental opinion of the New Jersey Supreme Court is reported at 63 N.J. 196, 306 A.2d 65, *cert. den sub nom Dickey v. Robinson* — U.S. —; 67 N.J. 333 (October Term 1972). Said opinions are appended to petitioners brief as appendices A, B, C and D, respectively.

JURISDICTION

The judgment sought to be reviewed is dated and was entered on May 23, 1975.

The jurisdiction of this court is invoked under 28 U.S.C.A. §1257(3) which provides for review of decisions in which state statutes are held violative of the United States Constitution but is clearly not applied herein. The Petitioner lack standing, he is not a party to the action merely an amicus.

The Petition on its face does not state a substantial Federal question and is a sham.

The initial opinion of the New Jersey Supreme Court constitutes its judgment, *N.J. Court Rules* 2:11-3(b). In its opinion filed April 3, 1973, the New Jersey Supreme Court directed further argument on remedies. The court entered its further opinion on June 19, 1973. The time within which to appeal a petition for *certiorari* runs from the date of the April 3, 1973 judgment, *Department of Banking v. Pink*, 317 U.S. 264, 268.

The alleged order under appeal is merely interlocutory.

---

[1] *New Jersey Court Rules* 2:11-6(a) provide that a petition for rehearing must be made within ten days after entry of judgment.

QUESTIONS PRESENTED

1. Does this court have jurisdiction to enforce and interpret the New Jersey Constitution by reviewing decision of the New Jersey Supreme Court based solely on State grounds under the guise of the guarantee of a Republican form of government mandated by Article IV, Sec. 4 of the U.S. Constitution?

2. Does the decision of the New Jersey Supreme Court by interpreting the State Constitution so violate the doctrine of the separation of powers as to deprive the people of New Jersey of a Republican form of government and compel Federal intervention?

3. Does the decision of the New Jersey Supreme Court violate the doctrine of the separation of powers by exercising the time honored power of judicial review?

COUNTER-STATEMENT OF CASE

On February 13, 1970 a complaint was filed in the Superior Court of New Jersey under the name *Kenneth Robinson et al. v. William T. Cahill et al.* The suit sought alternatively declaratory relief and injunctive relief presenting several complex questions which can be simplistically stated as:

Does the present system of financing and providing education violate provisions of the United States and/or the New Jersey Constitution.

That suit passed through three amended complaints as well as a pre-trial, on March 12, 1971, and was reached for trial without a jury on November 1, 1971.

To facilitate the trial both parties moved for summary judgment and agreed that all affidavits filed would be treated as evidence and defendant was deemed to have admitted all facts that their evidence did not specifically contradict, but did not admit any of the opinions set forth in the affidavits to be true, *albeit* the Court could consider and accept those opinions. The Attorney General filed no affidavits. After a trial which consumed several days, final argument in the matter was set for, and held, on December 10, 1971. Supplemental material was requested by the Court and supplied by counsel. On January 19, 1972 an opinion of the court, finding for the plaintiffs was rendered. An order for judgment was submitted to the Attorney General but objections were made and plaintiffs moved to settle the terms of the judgment, that motion was returnable on February 4, 1972. At that time, after hearing the argument of counsel, the court entered its final judgment.

The judgment included a declaratory judgment for the plaintiffs, an injunctive order effective January 1, 1973

and a directive that the Commissioner of Education file a certain plan with the Court by November 15, 1972. These later provisions were contingent upon legislative inaction in the field.

Thereafter plaintiffs moved in the Supreme Court of New Jersey for certification and to shorten the time for appeal to avoid delay of a hearing in the Appellate Division. During the pendency of that motion, the Attorney General filed his Notice of Appeal on February 25, 1972. The motion for certification was thereafter granted.

An oral application was made on February 4, 1972 by the Attorney General for an alteration in the time schedule in the judgment and for a clarification of the opinion of the trial court. That application was denied on February 4, 1972 without prejudice to the Attorney General submitting further evidence. On March 30, 1972 the trial court, after extracting the Attorney General's position, reaffirmed the denial of the application for an extension in the time schedule set forth in the main opinion and filed an opinion in connection with that denial.

On April 3, 1973 the Supreme Court of New Jersey decided the instant case of *Robinson v. Cahill,* 118 N.J. Super. 223 (Law Div. 1972); 119 N.J. Super. 40 (Law Div. 1972); *aff'd* – N.J. – (1973). In the opinion of Chief Justice Weintraub writing for the court, the court expressed the desire for further views of the parties as to: the content of the judgment including argument as to whether the judiciary may, as the trial court did with respect to the minimum aid and save harmless provisions of the so-called Bateman Act, 118 N.J. Super. at 280-281, order that monies appropriated by the Legislature to implement said act shall be distributed "upon terms other than the legislative ones." On June 19, 1973 the Court determined no further action would be taken at this time. In October 1973 this Court denied certiorari and on May 23, 1975 the New Jersey Supreme Court directed supplemental relief see 67 N.J. 333 (1975).

FEDERAL QUESTION

There is simply no Federal question involved.

The imagined federal question for which review is sought in this court involves Article IV, Sec. 4 of the U.S. Constitution. This section was not referred to in the pleadings nor was its applicability litigated in the state courts. The petitioners argue that New Jersey Supreme Court decision interfered with the prerogatives given the Legislature under Article VIII, Sec. 4, Par. 1 of the New Jersey Constitution. Such an argument is absurd. The court simply declared a statute unconstitutional as violative of the State Constitution and has acted to reallocate funds to enforce its judgment. The petitioners argue that the decision by the New Jersey Supreme Court constitutes states action which deprives the people of New Jersey of a Republican form of government guaranteed them by the Federal Constitution. These arguments would of course apply to every declaratory judgment. Thus petitioners in essence argue that the United States Supreme Court must under the Republican form of Government clause review any state Court decision holding a State Statute unconstitutional on State grounds. Such an argument is not only absurd but would violate the fundamental relationship between the States and the Federal Government.

Under such circumstances, this court lacks jurisdiction, *Whitney v. California,* 274 U.S. 337; *Thomas v. Iowa,* 209 U.S. 258; *Cf. Adler v. Board of Education,* 342 U.S. 485, 496.

ARGUMENT

POINT I

In New Jersey the most logical point of origin to discuss any educational issue is Article VIII, Sec. IV, Par. 1 which provides in pertinent part:

> "the legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of 5 and 18 years."

This provision was first adopted in 1875 as an amendment to the 1844 Constitution. At that time New Jersey had recently enacted the Free School Law L. 1871, c. 527 and to secure the right to education in more permanent form the amendment was passed Cf. Roscoe L. West, *Elementary Education in New Jersey: A History*, D. Van Nostrand Co., Inc. (Princeton 1964) at pp. 42-45. At that time education was funded almost exclusively by a uniform tax on all real property leaving local districts to add on if required. The State Superintendent Apgar said of the concept of this system of school finance, "The principal support will come from the State, and if any sum is needed to be voted by the township, it will be small. . . ." Annual report of State Superintendent of Education 1871 at p. 12.

Thereafter the relevant history was concisely set forth by the trial court: "The 1871 School Law raised significantly the proportion of school costs borne by the State. In 1870, for example, township and district school taxes ($1.45 million) and tuition ($72,000) constituted 90% of the total statewide expenditures ($1.66 million) and the State appropriation was only $100,000. *Annual School Report, 1870*, at p. 11. Thereafter, from 1872 through 1880, State funding averaged 75% of all school costs, exclusive

of construction and repairs. Local revenues constituted 23% of current expenses and 40% of all expenditures inclusive of construction and repair of schools. In fact, during these years many townships and districts raised no school taxes at all. In 1872, for example, 188 of 230 townships and 887 of 1378 districts raised no school tax. *N.J. School Report, 1872*, at p. 8.

The State continued for many years to pay a large portion of all school costs, although in 1881 it enacted a law ordering 90% of State school taxes returned to the county of origin, leaving only 10% to be distributed by the State Board equitably. L. 1881, c. 106. However, even under the 1881 law, monies returned to the counties were apportioned to all school districts in accordance with pupil census, so that equalization was achieved at least among pupils of each county. As late as 1910, for example, the State share of current expenses was approximately 67% and was almost equal to the total cost of teachers' salaries. *N.J. School Report, 1910*, at p. xv, xvi (Da429 to Da430).

This history is of some merit in understanding the context in which the Constitution of 1884 was amended. Obviously, neither Plaintiffs nor the State Court argued that the history of the 1857 enactment is controlling, for in 1947 the clause was reenacted in the new Constitution and the intent of the new delegates may not have been that public education had to be fully funded by the State out of general revenues. A proposal to include language to clearly attain that end was not adopted, *albeit* the reasons it was not acted on or the intent of the delegates is not clear. "Recommendation of the New Jersey State Federation of Labor," V Proceedings of the Constitutional Convention of 1947, State of New Jersey, Appendix, at p. 893.

It should be obvious that the clause must have had some meaning.

Prior to the initial Amendment each municipality would determine the existence *vel non* of educational opportunities. For example, it was in September of 1682 the Assembly of West Jersey ceded an isle in the Delaware River to aid the maintenance of a public school of the town of Burlington, *Cf.* Grants and Concessions of New Jersey p. 455. Eleven years later the first tax for the support of public schools was passed within the province of East Jersey, *Cf.* Grants and Concessions of New Jersey, pp. 328, 358. Throughout these early years it was municipal government which operated the schools *Cf. Riccio v. Hoboken,* 69 N.J.L. 104, 106-107 (Sup. Ct. 1903), 69 N.J.L. 649 (Err. & App. 1903).

There can be little doubt that the constitutional amendment of 1875 was designed to have some impact. Yet our present experience indicates it did not. There is still a system of local support and maintenance of free public schools with occasional state aid. A system which has remained unchanged since public education began in this state. The Constitutionality of this means of financing of education has remained unchallenged until the instant case.

In 1894, an attack on the inequality of educational facilities in the state was launched. Justice Dixon delivered the opinion of the Supreme Court in *Landis v. School District No. 44,* 57 N.J.L. 509 (Sup. Ct. 1895). *Landis* presented on a Writ of Certiorari a tax of 1893 in School District No. 44 of Cumberland County. The moving party urged *inter alia* that the power of each school district to determine what amount beyond the state appropriation should be raised by tax resulted in unequal educational opportunities and *ergo* was unconstitutional as local or special legislation. An argument not dissimilar to that to be made in *Brown v. Board of Education,* 347 U.S. 483 (1954). *Landis,* dealt with the constitutionality

anon of taxation by school districts to give education "beyond" that provided by the State, as opposed to the failure of the State to guarantee the "right to equal educational opportunities." Nonetheless, *Landis* recognized three key legal issues which are essential to understanding the equality of educational opportunity. First—*Landis* rejected the theory that the legislature is obligated to assure the same facilities are available to every child in the State. Such an affirmative guarantee of identical *facilities* may well be an unconstitutional guarantee as we shall see later. Second—*Landis* recognized that the purpose of the constitutional amendment was "to impose on the legislature a duty of providing for a thorough and efficient system of free schools. . . ." Third—*Landis* established that the schools mandated by the constitution to be provided by the legislature had to meet a standard, to wit "affording to every child such instruction as is necessary to fit it for the ordinary duties of citizenship," at 512.

This was the clause upon which the State Court decision rests. Clearly this ground is sufficient without any reference to any Federal issue to sustain the decisions of the Supreme Court of the United States. While New Jersey's Constitution has provisions comparable to the Equal Protection Clause of the United States Constitution, the State Court declined to rely upon them.

The New Jersey Constitution, Article I, Section I provides that "all persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness." As early as 1913 in *Smith v. Board of Examiners of Feeble Minded,* N.J. 35:46 (1913), Article I, Section I was recognized as a provision similar to the equal protection clause of the United States Constitution. In 1949 in

Washington National Insurance Company v. Board of Review of New Jersey Unemployment Compensation Commission, 1 N.J. 545, the initial indication of Article I, Section I, as forbidding legislation arbitrarily discriminating against some and favoring others in like circumstances was clearly set forth. There the Supreme Court recognized that there are different spheres of protection between the two provisions, but that essential to both, was the "concept of equality."

So too the New Jersey Constitution in Article I, Section V provides "no person shall be denied the enjoyment of any civil or military right or be discriminated against in the exercise of any civil or military right or be segregated in the public schools, because of religious principles, race, color or national origin." The clause of the New Jersey Constitution contains language clearly different from that of the United States Constitution, *Cf. West Morris Regional Board of Education v. Sills*, 110 N.J. Super. 234, 58 N.J. 464 (1971), but nonetheless is at least as strict as the federal constitution, *Cf. Jenkins v. Morristown*, 58 N.J. 483 and in many instances maybe stricter, *Booker v. Board of Education*, 45 N.J. 161 (1965). Specifically hereunder the plaintiffs desire to add that the equal protection clause of the New Jersey Constitution has been applied in two general categories, either dealing with rights generally under the first half of the Article, *Cf. Boulevard Apartments v. Mayor and Council of Lodi*, 110 N.J. Super. 406 (1970), *Washington National Insurance Company v. Board of Review*, 1 N.J. 545 (1949), or in specific areas such as racial discrimination in housing, *Jones v. Haridor Realty Corp.*, 37 N.J. 384 (1962); public schools, *Morean v. Board of Education of Montclair*, 42 N.J. 237 (1964); licensing, *Hart v. Teaneck*, 135 N.J.L. 174 (1947); and religion, *In Re Adoption of Seal*, 112 N.J. Super. 325 (1970).

New Jersey very recently has dealt with the question of whether or not under its constitution, as well as the federal constitution, classification of "poor people" is justifiable and constitutional. The test most concisely set forth by our courts in the case of *Puchalski v. New Jersey State Parole Board*, 104 N.J. Super. 294, *aff'd.* at 55 N.J. 113 (1969) *cert. den.* 398 U.S. 938 (1970). With respect to the poor as a classification, the question under our concept of equal protection of the law is simply whether or not the right under the constitution is of such fundamental importance that it should not be denied anyone because of lack of funds. Applied to the case at Bar the question becomes whether education is of such fundmental importance that it should not be deprived to any child because of the relative inability of his neighbors to finance his education.

Clearly the New Jersey Constitution contains adequate independent nonfederal grounds to sustain the decision herein.

Point II

The decision of the Supreme Court of New Jersey does not bridge the "doctrine" for separation of power but rather it is consistent with the traditional power of judicial review.

Attorneys General oft rely upon the "doctrine" of separation of powers to insist that an action should or may not be cognizable in a court of law. The "doctrine" has never been used to prevent a court from examining a complaint which charged another branch of government with willful discrimination against children and taxpayers, either black and/or poor who have no other remedy than to ask the court for relief.

The doctrine itself has been expressed in various ways being denominated Judicial self-restraint, 8 Rutgers L. Rev.

501; 42ABAJ, 829 or Separation of Powers 12 Rutgers L. Rev. 449, the distinction between judicial and political power has been carefully drawn.

The legitimate concern of the State Court was perhaps best expressed when a hastily and inarticulated claim of constitutionality of the public school finance system was projected with "no record" and without being "adequately briefed even by the proponents." The court said "We only suggest that the source of a solution appears to be more legislative than judicial." *Bd. of Ed. of Elizabeth v. City Coun. of Elizabeth*, 55 N.J. 501, 510 (1970). We note that the Supreme Court was speaking of the problem of declining tax base and growing demand for governmental services. We agree with the court that the issue is *more* legislative than judicial. That is not to say it is *not* judicial. In fact, the court declined to consider the constitutional question on an inadequate record and poor briefing "at this time" at 510, thereby clearly demonstrating that upon a proper record and thorough briefing it would and should consider the issue. The Court denied the plaintiffs herein the opportunity to appear as *amicus*, in that case.

It is noteworthy that the order of the court specifically provided in the *Elizabeth* case that in the event the court determines the constitutional issue to be involved in the appeal the present plaintiffs "will be permitted to come in as friends of the court." One wonders if the court foresaw the *Robinson* case as one in which the issue might be more properly presented, since the court would not consider the record before it to properly raise the issue. Similar reasoning has been used to explain the reluctance of the United States Supreme Court to act in some cases. *Cf. Gobitis, supra.*

More recently the Chief Justice, writing for a unanimous court, foresaw this problem as one arising in the

Courts when he noted, "We, of course, do not anticipate the question whether the State statutory scheme may, because of local failures, become unequal to the constitutional promise and command." *West Morris Reg. Bd. of Ed. v. Sills*, 58 N.J. 464, 477 (footnote 7) (1971).

The defendants would have this court believe that the issue is whether a court may order a legislature to deliberate, pass or repeal a statute as unconstitutional. One would expect that the existence of the power of judicial review and the concomitant duty of a court to strike down an unconstitutional legislative *fiat* was disposed of in 1803 with Chief Justice Marshall's opinion in *Marbury v. Madison, 1 Cranch*, 137 2 L.Ed 60 (1803) or in *Muakrat v. United States*, 219 U.S. 356 (1911). New Jersey recognized judicial review a year before *Marbury* in *State v. Parkhurst*, 9 N.J.L. 427 (Sup. Ct. 1802), a doctrine which this state has consistently enforced, *Wilentz v. Hendrickson*, 135 N.J. Eq. 244 (Err. & App. 1944) even to this day *Asbury Park Press v. Woolley*, 33 N.J. 1 (1966), *C. F. Baker v. Carr*, 369 U.S. 186 (1962), *Reynolds v. Sims*, 377 U.S. 533 (1964), *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

The most liberal jurists recognize that the injured children have no power to vote and influence the other forums of Government, and even the most conservative of jurisprudents will quickly concede that the courts have the power to hold the actions of the legislative or executive branches of government against the constitution of the Federal or State Governments. *State v. Parkhurst, supra, Wilentz v. Hendrickson, supra.* There is, of course, a presumption in favor of the constitutionality of a Legislative Act. *Cf. Trustees of Rutgers College v. Richman*, 41 N.J. Super. 259, 301 (Ch. Div. 1956). Judicial review both by Federal and State Courts is exercised with great judicial

restraint, *Cf. Ashwande v. Tennessee Valley Authority*, 297 U.S. 288 (1936); *Massachusetts v. Mellon*, 262 U.S. 288 (1923); *Public Service Coordinated Transport v. Newark Elizabeth Independent Bus Owners Asso.*, 3 N.J. 118 (1949). Judicial restraint is not to be confused with a denial of the power of judicial review. Judicial restraint now compels the United States Supreme Court not to intervene.

Plaintiffs feel that when legislature inaction has perpetrated from 1875 to date, the time for action has come. Judicial Review is appropriate.

Realizing that the declaration of unconstitutionality could in effect end education in New Jersey and being totally unwilling to accept that alternative plaintiffs proceed one step further and say, in effect, "let the legislature perform its mandated function but supervise them to see that the scheme they develop is constitutional." This type of continuing jurisdiction is not novel, *Brown v. Board of Education*, 347 U.S. 483 (1954) did just that. In *Reynolds v. Sims*, 377 U.S. 533 (1964) the United States Supreme Court added the "threat," thinly veiled, that if the legislature refused to act, the courts would act. The threat was carried out in *Griffith v. County School Board of Prince Edward County*, 377 U.S. 218 (1964) wherein the Supreme Court authorized the District Court to order the county to raise sufficient tax revenue to open up the schools of a county. The order herein is certainly less harsh.

One U.S. Circuit Court has actually ordered equalization of facilities between predominately Negro and predominantly white schools. See *U.S. v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966) *cert. denied*, 389 U.S. 840, *rehearing denied*, 389 U.S. 965. The court in that case offered a proposed court order for the District Court as follows:

> "In schools heretofore maintained for Negro students, the defendants shall take prompt steps necessary to provide physical facilities, equipment, course of instruction, and instructional materials of quality equal to that provided in schools previously maintained for white students . . . By October of each year, defendants shall report to the Clerk of the Court pupil-teacher ratios, pupil-classroom ratios and per pupil expenditures both as to operating and capital improvement costs, and shall outline the steps to be taken and the time within which they shall accomplish the equalization of such schools." 372 F.2d 836, 899-900.

See also *Hobson v. Hansen*, 296 F. Supp. 401 (D.D.C. 1967).

Thus the prospect of the courts, while retaining jurisdiction, ordering defendants to take certain actions, while the legislature devised a new scheme of financing education is not so alien to our system of jurisprudence. The Court below chose to rule that the law is unconstitutional without necessarily defining all of the legislature alternative measures which would meet constitutional requirements. See *William v. Rhodes*, 393 U.S. 23, 34 (1968). Thus the degree and character of the irrational irregularities in educational financing, demonstrated in the present case can result in a finding that constitutional guarantees have been breached, while still leaving the legislature free to adopt ameliorative measures such as school district apportionment, school fund supplementations, tax reformations or reallocation of resources, which would conform to the Constitutional requirements.

Even *McInnis v. Ogilvie*, 293 F. Supp. 327 (N.D. Ill. 1968) *aff'd. per curiam sub nom McInnis v. Ogilvie*, 394 U.S. 322 (1969) relied upon by petitioner, although it was different in its substance, form and theory as com-

pared with the case *Sub Judice*, decided that the "separation of powers" was no obstacle. *McInnis v. Ogilvie, supra,* and *Burrus v. Wilkerson,* 310 F. Supp. 572 (W.D. Va. 1969), 397 U.S. 44 (1969) are unanimous in their decision that the "separation of powers" does not bar an action in the nature of that *sub judice*.

Frequently the doctrine of separation of powers is confused and/or interchanged with the doctrine of sovereign immunity by which an "unauthorized" suit against the sovereign is avoided.

A proceeding to determine the constitutional force of a statute or a suit to restrain an agent of the state from enforcing an unconstitutional statute is not barred by sovereign immunity, *Abelson's Inc. v. N.J. State Board of Optometrists,* 5 N.J. 412 (1950). This case falls precisely within the bounds of *Abelson,* it is a suit to declare a statute unconstitutional. It seeks to restrain agents from enforcing the unconstitutional statute. The docrtine of sovereign immunity simply does not apply.

To grant the Petition for Certiorari is to place in jeopardy long standing doctrines of judicial review and longstanding separation of State and Federal governments. It was these doctrines which compelled this court to uphold inequitable State financing schemes for public education in *San Antonio Independent School District v. Rodriguez,* – U.S. –, 93 S. Ct. 1278, 36 L.Ed. 16 (1973).

CONCLUSION

For all the reasons urged, and because the instant case was based upon adequate independent State grounds it is respectfully submitted that the petition should be denied.

Respectfully submitted,

/s/ Harold J. Ruvoldt, Jr.
HAROLD J. RUVOLDT, JR.
Attorney for Respondents